

COUNTERCLAIMS

Counterclaimants DIRECTV, Inc. and Hughes Electronics Corporation ("Hughes") allege the following Counterclaim against Counterdefendants EchoStar Communications Corporation, EchoStar Satellite Corporation, and EchoStar Technologies, Inc. (collectively "EchoStar"):

I. NATURE OF THE ACTION

1. DIRECTV, Inc. and Hughes allege claims based on four separate wrongful business practices of EchoStar. First, EchoStar has wrongfully interfered with DIRECTV, Inc.'s contractual relationship with Kelly Broadcasting Systems ("KBS"). In October 1999, DIRECTV, Inc. entered into a contract to acquire programming and services from KBS. After working together for months, however, DIRECTV, Inc. was told by KBS that EchoStar and KBS had entered into a contract under which EchoStar and KBS were to merge. Such a merger between KBS and one of DIRECTV, Inc.'s competitors constitutes breach by KBS of the DIRECTV, Inc./KBS contract. EchoStar's efforts to induce KBS to breach its contract with DIRECTV, Inc. were unlawful and have injured DIRECTV, Inc.

2. Second, for the past two years, EchoStar falsely advertised to consumers that it had the right to offer network programming. In fact, EchoStar had no right to sell copyrighted network programming to many of its subscribers during this time period. Its sales of distant and local network programming violated the copyright laws. As a result, EchoStar misled subscribers into believing they were lawfully entitled to receive the copyrighted programming when in fact they did not qualify. DIRECTV, Inc. suffered significant competitive injury from EchoStar's false advertising and unfair competition.

3. Third, EchoStar has engaged in a pattern of unfair and unlawful acts in an attempt

to convert PrimeStar satellite television subscribers to EchoStar service. PrimeStar is owned by Hughes. EchoStar has misused and infringed the registered PRIMESTAR® marks in its advertising and marketing, has conspired with its dealers to create misleading advertising using the PrimeStar marks, and has encouraged its dealers to engage in misleading and fraudulent practices to trick customers into switching from PrimeStar to EchoStar. As a result of the consumer confusion caused by EchoStar, viewers who would have stayed with PrimeStar or who would have subscribed to DIRECTV, Inc. have been misled into signing up with EchoStar instead.

4. Fourth, EchoStar's marketing of National Football League ("NFL") games on DISH Network has been misleading. EchoStar has misleadingly advertised that an extensive schedule of NFL games were available on DISH Network; however, the claimed number of games was available only to the limited number of subscribers who qualified for and paid extra to receive two packages of distant network signals under the Satellite Home Viewer Act ("SHVA"). Adding to consumer deception was EchoStar's marketing campaign, which touted that EchoStar was "Your Ticket to the NFL." In fact, EchoStar's use of the NFL trademark was unlawful and unauthorized by the NFL. This slogan and EchoStar's marketing campaign created the likelihood that consumers would believe the EchoStar NFL offering was the same as, or was affiliated with, DIRECTV, Inc.'s "NFL Sunday Ticket," a program package offered with the approval and authorization of the NFL. This has harmed DIRECTV, Inc. through loss of subscribers, revenue, and goodwill.

II. PARTIES

5. DIRECTV, Inc. is a California corporation with its principal place of business at 2230 E. Imperial Highway, El Segundo, California 90245.

6. Hughes Electronics Corporation is a Delaware Corporation with its principal place

of business in El Segundo, California.

7. Upon information and belief, EchoStar Communications Corporation is a Nevada corporation with its principal place of business at 5701 South Santa Fe, Littleton, Colorado 80120.

8. Upon information and belief, EchoStar Satellite Corporation is a Colorado corporation with its principal place of business at 5701 South Santa Fe, Littleton, Colorado 80120.

9. Upon information and belief, EchoStar Technologies Corporation is a Texas corporation with its principal place of business at 5701 South Santa Fe, Littleton, Colorado 80120.

III. JURISDICTION AND VENUE

10. DIRECTV, Inc. and Hughes raise the following counterclaims pursuant to Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (false description and designation of origin); the Colorado Consumer Protection Act, Colo. Rev. Stat. §§ 6-1-101 et seq.; the California Business and Professions Code §§ 17200 and 17500 et seq.; the common law of unfair competition; and Section 32 of the Lanham Act, 15 U.S.C. § 1114 (trademark infringement).

11. DIRECTV, Inc. and Hughes, on the one hand, and EchoStar, on the other hand, are residents of different states, and the amount in controversy exceeds \$75,000, including interest and costs.

12. This Court has jurisdiction of these counterclaims pursuant to 28 U.S.C. §§ 1331, 1332, 1338, and 1367.

13. EchoStar has its principal place of business in Littleton, Colorado.

14. EchoStar has filed a complaint against DIRECTV, Inc., Hughes and others in this District.

15. EchoStar is licensed to do business, transact business, and/or is found in this District, and a substantial part of the acts or omissions giving rise to the counterclaims herein

occurred in this District. EchoStar's acts have caused harm to DIRECTV, Inc., Hughes and consumers in this District.

16. This Court has personal jurisdiction over EchoStar.
17. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(b).

IV. ECHOSTAR'S UNLAWFUL BUSINESS PRACTICES

A. EchoStar's Tortious Interference with DIRECTV, Inc.'s Contract with Kelly Broadcasting Systems.

18. Kelly Broadcasting Systems, Inc. ("KBS") is a provider of ethnic broadcast programming, such as Greek, Asian/Indian and Brazilian programming, to cable and satellite operators. KBS is owned by Michael Kelly, who serves as chief executive officer.

19. In late summer 1999, DIRECTV, Inc. and KBS — led by Michael Kelly — entered into contract negotiations. DIRECTV, Inc. and KBS finalized and executed their agreement, effective October 14, 1999 ("October 14 Agreement"). Pursuant to the October 14 Agreement, KBS agreed to give DIRECTV, Inc. access to Asian/Indian, Russian, Arabic, Italian, Korean, Greek, and Chinese channels, and KBS agreed to serve as a DIRECTV, Inc. sales agent. The parties also agreed to finalize a warrant purchase agreement, which would give DIRECTV, Inc. an ownership interest in KBS. The essential terms and conditions of the Warrant Purchase Agreement were agreed to in writing by DIRECTV, Inc. and KBS, and are set forth in an attachment to the executed October 14 Agreement.

20. The October 14 Agreement was non-assignable unless the assigning party obtained written consent from the other party, or on the occurrence of certain other conditions not relevant here. The October 14 Agreement expressly prohibited assignment of KBS's rights and obligations

to a competitor of DIRECTV, Inc. EchoStar is such a competitor.

21. Information provided to KBS by DIRECTV, Inc. under the October 14 Agreement was subject to strict confidentiality provisions. KBS agreed not to reveal DIRECTV, Inc.'s confidential information. KBS obtained confidential information from DIRECTV, Inc. under the October 14 Agreement.

22. After DIRECTV, Inc. and KBS executed the October 14 Agreement, DIRECTV, Inc. issued a press release announcing that it had entered into a multiyear contract with KBS, under which DIRECTV, Inc. stated that it would distribute KBS programming. Michael Kelly was also publicly quoted concerning the Agreement: "We are excited to partner with DIRECTV, Inc. to bring a diverse lineup of quality ethnic programming to consumers nationwide." The October 14 Agreement was widely reported in the trade publications.

23. After completing the October 14 Agreement, DIRECTV, Inc. and KBS continued to work together and to execute attachments and exhibits as provided for in the October 14 Agreement. 24. Upon information and belief, EchoStar learned of the DIRECTV, Inc./KBS deal when it was publicly announced. Thereafter, EchoStar engaged in an intentional course of conduct to improperly interfere with the October 14 Agreement.

25. In early March 2000, without any prior notice, Michael Kelly informed DIRECTV, Inc. that KBS had signed an agreement to merge with EchoStar.

26. The agreement to sell KBS to EchoStar constituted a material breach of KBS's obligations under the October 14 Agreement, including but not limited to the non-assignment, cooperation, best efforts and confidentiality provisions of the October 14 Agreement. Consummation of the merger would constitute further material breach by KBS.

27. Upon information and belief, EchoStar's actions to induce KBS to violate its

agreement with DIRECTV, Inc. were improper, and were taken with knowledge of the October 14 Agreement. EchoStar intentionally interfered with KBS's performance under the October 14 Agreement in order to injure DIRECTV, Inc. Had EchoStar not improperly induced KBS to breach the October 14 Agreement, KBS would have performed its obligations thereunder.

28. As a result of EchoStar's tortious conduct, DIRECTV, Inc. has suffered (and will suffer) damages, including irreparable injury.

B. EchoStar's False Advertising and Unfair Competition Concerning Local and Distant Network Programming.

29. In January 1998, EchoStar announced that it was launching a new local network programming service to its subscribers in twenty of the top U.S. television markets. Subscribers in these markets would be able to receive their local network programming through EchoStar's DISH Network satellite television service. EchoStar CEO Charlie Ergen stated, "When customers go into a store interested in a satellite television system, eight out of ten of those people walk out of the store without making a purchase when they find out they cannot get their local channels. . . . Only EchoStar and DISH Network can provide that guarantee."

30. Because the programming carried on the local channels is copyrighted, EchoStar needed a license in order to lawfully transmit the local channels to subscribers. For this purpose, EchoStar relied on the compulsory license provisions of the SHVA. 17 U.S.C. §§ 119 et seq. The SHVA allows a satellite carrier to transmit copyrighted programming without the permission of the copyright holder only to "unserved households," a restriction known as the "white area restriction." At the time EchoStar launched its local channel plan, the statute defined unserved households in part as those "who cannot receive through use of a conventional outdoor rooftop antenna an over-the-air signal of grade B intensity (as defined by the Federal Communications

Commission) of a primary network station affiliated" with the relevant network, and who also had not subscribed to cable within the last 90 days. 17 U.S.C. § 119(d)(10)(a). Although the SHVA was modified in November 1999 to delete the "no cable" requirement, Congress retained the same less-than-grade B signal requirement.

31. In the months following its January 1998 announcement, EchoStar began local service in numerous large television markets. By May 1998, EchoStar was providing local network service to 13 television markets. EchoStar accompanied its local network service with a marketing campaign designed to inform consumers about the new service and to compete against DIRECTV, Inc. This marketing included a series of press releases (posted on the company's Internet web site), wherein it claimed to be "the only direct broadcast satellite company to offer local channels." EchoStar's local channel advertisements falsely implied that EchoStar had a legal right to transmit the local channels to subscribers in "served" households. EchoStar failed to disclose that it lacked permission of the copyright holders or any other right to transmit the local programming to such subscribers.

32. At the same time that it was inaugurating its local channel service, EchoStar also offered two packages of distant network signals, one from cities on the East Coast and the other from cities on the West Coast. These signals were provided to EchoStar pursuant to a contract with PrimeTime 24 Joint Venture ("PrimeTime 24"), for whom EchoStar acted as a distributor.

33. In order to transmit these copyrighted distant network signals to subscribers, EchoStar also relied on the SHVA's compulsory license. Only subscribers located in unserved households were eligible to receive the distant network signals.

34. PrimeTime 24 provided EchoStar with a qualification methodology to determine whether a subscriber was in an "unserved household." This methodology was based on asking

subscribers three questions: (1) would the signals be viewed in their home, (2) did the household receive an acceptable quality picture using a conventional rooftop antenna, and (3) did the household have cable within the past 90 days. Subscribers who wanted the service for residential use and who answered in the negative to questions two and three were deemed eligible under the SHVA to receive the network programming.

35. In 1996, CBS Broadcasting, Inc., Fox, Inc. and several affiliates brought suit against PrimeTime 24 in federal court in Miami, Florida, alleging that PrimeTime 24's qualification methodology -- the same methodology used by its distributor EchoStar -- was inadequate under the SHVA and that their copyrights in the network programming had been infringed (the "Miami Action"). CBS and Fox sought a preliminary and permanent injunction against PrimeTime 24's use of the three-question qualification methodology nationwide and to require termination of service to existing ineligible subscribers.

36. ABC, Inc. also brought suit against PrimeTime 24 in the Middle District of North Carolina, seeking similar injunctive relief from the same conduct, but limited to the Raleigh-Durham television market area.

37. In May 1998, the Miami Court indicated that it was going to grant the requested preliminary injunction against PrimeTime 24. After reviewing the legislative history behind the SHVA, related federal regulations, and the statute itself, the Miami Court construed the SHVA against PrimeTime 24. It rejected PrimeTime 24's three-question SHVA qualification methodology (described above in Paragraph 34). The Miami Court ruled that PrimeTime 24 and its distributors could presumptively satisfy the SHVA by using a signal propagation model to predict signal strength at individual households known as the Individual Location Longley-Rice methodology ("ILLR"). The Miami Court also prescribed a methodology for signal strength

testing at individual households which also would satisfy the SHVA.

38. Under Fed. R. Civ. P. 65, distributors such as EchoStar that were "acting in concert" with PrimeTime 24 were also bound by the ruling. Within a few weeks of the Miami Court's issuance of the preliminary injunction in July 1998, EchoStar terminated its relationship with PrimeTime 24 and ceased being its distributor.

39. After a trial on the merits in August 1998, the Miami Court made permanent the requirements of the preliminary injunction described above. The North Carolina Court ruled against PrimeTime 24 on summary judgment and imposed a similar injunction, a decision thereafter affirmed by the Fourth Circuit Court of Appeals.

40. DIRECTV, Inc. altered its qualification methodology in July 1998 to conform to the Miami Court's injunction.

41. EchoStar, however, refused to conform its qualification methodology to the construction given the SHVA by the Miami and North Carolina federal courts. It did not adopt any form of the ILLR, nor did it implement signal strength testing at individual households. Instead, EchoStar implemented a different qualification methodology.

42. EchoStar's practice uses different parameters and methodology than the ILLR approved by the Miami Court and codified in the current version of the SHVA.

43. EchoStar has not adequately determined whether any particular household actually qualifies as "unserved" by receiving less than a Grade B signal. In fact, EchoStar has significantly overestimated the number of qualified subscribers, allowing it to sign up thousands of ineligible subscribers. Upon information and belief, EchoStar has further compromised a flawed ZIP code-based methodology by entering inaccurate ZIP codes rather than the true ZIP codes of its subscribers' homes. As a result of intentionally entering the wrong ZIP codes, even more

ineligible subscribers have been signed up for network services.

44. EchoStar admitted in a recent report to its shareholders that if it were compelled to conform its SHVA qualification methodology to that prescribed in the Miami Action and used by DIRECTV, Inc. (and now codified by the Satellite Home Viewer Improvement Act), it would have to terminate network service to a significant number of its subscribers.

45. Not only has EchoStar used its inadequate methodology to determine the eligibility of new subscribers to receive distant network programming, but it has failed to take steps to ensure that the subscribers to whom it was transmitting network programming as of July 1998 -- subscribers who had been qualified under the methodology that the Miami and North Carolina courts found to be wholly inadequate under the SHVA -- are in fact eligible. Upon information and belief, EchoStar has not requalified any of these pre-July 1998 subscribers. Even so, it continues to illegally provide them network programming.

46. The less restrictive and legally inadequate qualification methodology used by EchoStar has given it an unfair competitive advantage against DIRECTV, Inc., taking subscribers from DIRECTV, Inc. and signing up new subscribers with the lure of offering network programming, when in fact these subscribers do not qualify under the SHVA to receive it.

47. Throughout the period that it has been using the invalid qualification methodology, EchoStar has advertised the fact that it offered local and distant network programming, without informing potential and current subscribers that the method it was using to determine their eligibility was totally inadequate under the law. EchoStar's advertising implied to consumers that it had a legal right to transmit the copyrighted network programming and that they had a legal right to receive it. Advertisements omitted the fact that there were legal restrictions on eligibility to receive network programming, or inadequately described the restrictions, and none disclosed

that EchoStar did not have a legal right to transmit the programming. In fact, EchoStar had no such right for the majority of the subscribers it signed up for the service. Thus, EchoStar's advertising deceived consumers into believing, erroneously, that EchoStar was legally permitted to transmit the programming.

48. One such marketing campaign was launched on EchoStar's Internet web site. Potential and current subscribers could go to EchoStar's web site, enter their address and ZIP code, and they would be told whether they qualified to receive network programming. Many were told that they did so qualify. This was false and misleading because EchoStar's methodology was legally inadequate under the SHVA, and a subscriber's ZIP code is an insufficient basis to determine eligibility for the vast majority of households.

49. EchoStar also carried out an extensive campaign in the local markets where it offered local channels, including print and television advertisements, capitalizing on its improper practices. In one such television ad, run in Phoenix, Arizona in August 1999, EchoStar in large type announced it offered "PHOENIX LOCAL CHANNELS," with a voice-over stating "Get Phoenix local channels on DISH Network without a rooftop antenna." Similarly, in a full-color advertisement, EchoStar compared features of DISH Network with DIRECTV, Inc. and cable. One line of the advertisement compares "Local Broadcast Networks From Satellite" available on DISH, DIRECTV, Inc. and cable. EchoStar claimed to offer 60 such "local" broadcasts, while DIRECTV, Inc. was shown as offering only 8. EchoStar could do this only on the basis of improper practices. Upon information and belief, EchoStar conducted similar television and print advertising in the other markets where it offered local channels.

50. The actual and implied misrepresentations and misleading statements of fact and law were material. Upon information and belief, EchoStar's advertising and course of conduct

significantly impacted the public as actual or potential consumers of its services. Consumers were likely to be, and in fact were, confused and misled concerning the nature, characteristics and qualities of EchoStar's network programming service. EchoStar's advertising was likely to confuse, and actually did confuse, consumers into believing that EchoStar had the right to transmit the copyrighted network programming. The consumers residing in served households who signed up for EchoStar's network services became unwitting participants in EchoStar's widespread pattern of copyright infringement.

51. Many of these consumers would not have signed up with EchoStar if EchoStar had not misled and confused them as to their eligibility to receive network programming under the SHVA. Some of these consumers would have signed up with DIRECTV, Inc. instead. As a result of EchoStar's false advertising and unfair competition with respect to local and distant network programming DIRECTV, Inc. has suffered (and will suffer) damages, including irreparable injury.

C. EchoStar's Illegal Practices with Respect to Conversion of Primestar Subscribers.

52. Primestar is a provider of multi-channel video programming to subscribers via satellite, including both the programming and the hardware necessary to receive programming.

53. In 1991, Primestar lawfully registered the service mark PRIMESTAR® with the United States Patent and Trademark Office, U.S. Registration No. 1,663,679. A copy of this registration is attached hereto as Exhibit A. Primestar has filed an Affidavit of Continued Use, which was accepted by the U.S. Patent and Trademark Office in 1997. Primestar's registration of the PRIMESTAR® mark therefore continues in full force and effect.

54. In 1999, Hughes acquired the PRIMESTAR® name and mark and associated goodwill. Hughes then granted Primestar, Inc. a license to use the PRIMESTAR® name and mark.

Hughes, the parent of Primestar, Inc., is the owner of all rights in the PRIMESTAR® name and mark and associated goodwill.

55. Since November 1990, Primestar has prominently used the PRIMESTAR® name and mark in connection with its services and related goods. Primestar has spent millions of dollars since 1990 displaying, promoting and advertising the PRIMESTAR® name and mark. Because the PRIMESTAR® mark has been in continuous use for five consecutive years subsequent to the date of registration and is still in use in commerce, the PRIMESTAR® registration is incontestable under 15 U.S.C. § 1065.

56. In addition to its PRIMESTAR® mark, as part of its digital TV entertainment services, Primestar has used, displayed, promoted and advertised a family of marks that begin with the word "PRIME." This family of marks includes PRIMEValue®, PRIMECinema®, PRIMEAudio®, and PRIMEEntertainment®. These marks are all owned by Hughes and licensed back to Primestar, Inc.

57. The PRIMESTAR® name and mark have gained widespread recognition as an indicator of a source of high-quality service in the multi-channel video programming distribution industry. Primestar's name and service mark are distinctive, well-known and famous based in part on Primestar's high visibility and superior reputation in the multi-channel video programming distribution industry.

58. Based on the first and exclusive use of the PRIMESTAR® mark in advertising and on services and related goods, Primestar created strong common law rights in the PRIMESTAR® mark. These rights, with associated goodwill, have been assigned to Hughes, and the rights to the name and mark have been licensed back to Primestar, Inc.

59. In 1999, EchoStar began a national advertising and marketing campaign entitled the

"Primestar Promotion." EchoStar has made decisions concerning the content, type, placement and approval of such advertising from its headquarters and other facilities in Colorado. EchoStar's "Primestar Promotion" advertising campaign made multiple uses of, and traded on, the goodwill associated with the PRIMESTAR® name and mark. Rather than being a promotion of Primestar programming and hardware, however, the "Primestar Promotion" was actually an EchoStar campaign specifically targeted at then-current Primestar customers with the likelihood to mislead, confuse and/or deceive Primestar customers into believing that the goods and services offered therein were endorsed, sponsored or otherwise affiliated with Primestar and its products and services. Specifically, the "Primestar Promotion" offered by EchoStar was likely to mislead, confuse and/or deceive Primestar customers into unwittingly switching from Primestar to DISH Network programming and hardware in the mistaken belief that there was some form of affiliation, sponsorship or approval of DISH Network by DIRECTV, Inc. and/or Hughes.

60. The "PrimeStar Promotion" appeared in several different media. EchoStar operates web sites on the Internet. On certain of those sites, as part of its "Primestar Promotion" program, EchoStar used the PRIMESTAR® name and mark in a manner likely to confuse, mislead and deceive consumers into believing that the services and goods offered therein were endorsed by or otherwise affiliated with Hughes and its subsidiary Primestar. An EchoStar site further referred to a "PRIME UPGRADE" that was offered to Primestar customers. Use of this phrase by EchoStar was likely to confuse consumers because of its similarity with Hughes' family of "PRIME" marks.

61. Also as part of its "Primestar Promotion," EchoStar had a hyperlink stating "DO YOU HAVE Primestar?" on one of its web sites. Customers using this hyperlink on the EchoStar web site were transferred to a new and different web page where they were greeted with an

advertisement stating, "DEAR PrimeStar CUSTOMER: TAKE ADVANTAGE OF PRIME UPGRADE SPECIAL NOW!" The same language was used in print advertisements and promotional materials that were designed, sponsored and funded by EchoStar and disseminated by its authorized dealers nationwide. Identical language also was used in co-op advertising slicks located on EchoStar's dealer web site. These ads were funded by EchoStar for use by its retail dealers. These aspects of the EchoStar "PrimeStar Promotion" were intended to reach current PrimeStar customers and were likely to mislead, confuse and/or deceive PrimeStar customers into unwittingly switching from PrimeStar to DISH Network programming and hardware in the mistaken belief that they were simply upgrading their PrimeStar service.

62. EchoStar's use of the word "PRIME" and the phrase "PRIME UPGRADE" in its "PrimeStar Promotion" shows further EchoStar's intent to create confusion and trade on goodwill created by PrimeStar. EchoStar's use of the word "PRIME" and the phrase "PRIME UPGRADE" in its "PrimeStar Promotion" followed the same style of marks used by PrimeStar in the "PRIME" family of marks and was designed and likely to confuse, mislead and or deceive customers into believing that the services and goods offered by EchoStar were endorsed by, sponsored by, or otherwise affiliated with PrimeStar or Hughes.

63. EchoStar did not need to use the PRIMESTAR® name or mark to advertise or promote its goods or services. Even if there were any legitimate reason for EchoStar to use the PRIMESTAR® name or mark, EchoStar made far greater use of the PRIMESTAR® name and mark in its "PrimeStar Promotion" than was necessary to identify any product or service of EchoStar.

64. In addition, as part of EchoStar's misleading and unauthorized "PrimeStar Promotion," EchoStar encouraged its dealers to engage in misleading and even fraudulent

practices as part of EchoStar's efforts to induce PrimeStar customers to switch to EchoStar's DISH Network system. In an EchoStar promotional broadcast, EchoStar corporate officers Charlie Ergen and Jim DeFranco encouraged EchoStar dealers to visit known PrimeStar customers claiming that they were there to "upgrade" their PrimeStar systems when, in fact, they were there to mislead, confuse and/or deceive PrimeStar customers into unwittingly switching from PrimeStar to DISH Network programming and hardware in the mistaken belief that they were simply upgrading their PrimeStar service.

65. In the promotional broadcast, the EchoStar officers further recommended to EchoStar dealers that, in order to secure their sales and protect their commissions, they should remove or completely disassemble the PrimeStar satellite equipment so as to make reinstallation of the PrimeStar system virtually impossible if the PrimeStar customers learned that they had been victims of EchoStar's misleading and confusing "PrimeStar Promotion." The EchoStar officers even went so far as to suggest that the EchoStar dealers should "lose" disassembled PrimeStar parts or "leave them there" but make sure "they're harder to find." Upon information and belief, EchoStar dealers have, in fact, engaged in these and other deceptive and unfair practices based on the instructions and encouragement of EchoStar.

66. Upon information and belief, EchoStar intentionally used the PRIMESTAR® name and mark for its "PrimeStar Promotion," in order to (i) trade on the goodwill associated with the PRIMESTAR® name and mark; (ii) cause consumers to associate EchoStar and DISH Network with PrimeStar, or to believe that EchoStar's DISH Network service is affiliated, sponsored, approved or authorized by PrimeStar and Hughes; and (iii) wrongly benefit from the widespread name recognition, fame and goodwill associated with the PRIMESTAR® name and mark.

67. EchoStar's unauthorized use of the PRIMESTAR® name and mark in its advertising

has misled, confused and deceived Primestar customers into switching from Primestar to DISH Network programming and hardware. In addition, the unfair business practices by EchoStar dealers at the homes of Primestar customers, engaged in at the direction of and with the encouragement of EchoStar, has resulted in confusion and deceit of Primestar customers and damage to Primestar property.

68. DIRECTV, Inc. is likely to be and has been damaged by the foregoing acts of false and misleading advertising, trademark infringement and unfair competition. Primestar subscribers have been confused and misled and have switched to EchoStar's DISH Network as a direct result of the foregoing acts. Some of these subscribers would have switched to DIRECTV, Inc. (or remained with its affiliate) rather than switching to EchoStar, had they not been deceived by EchoStar's tactics, causing loss of subscribers and loss of revenue to DIRECTV, Inc.

69. Hughes has been damaged by EchoStar's trademark infringement.

D. EchoStar's False and Misleading Advertisements Concerning the NFL.

70. Beginning in 1996, EchoStar repeatedly promoted its DISH Network satellite television service by advertising (1) that extensive coverage of NFL football games is available through DISH Network; (2) that DISH is the viewers' "Ticket to the NFL"; and (3) that up to 147 games are available through DISH. EchoStar has made decisions concerning the content, type, placement and approval of such advertising from its headquarters and other facilities in Colorado.

71. EchoStar's NFL campaign appeared in various forms in different media. These ads first appeared at the beginning of the football season in 1996. EchoStar conducted a similar campaign in 1997 and 1998.

72. DIRECTV, Inc. negotiated and paid for the right to use the NFL trademark to promote DIRECTV, Inc.'s service. The trademark "NFL" is registered to NFL Properties, Inc.,

from whom DIRECTV, Inc. licensed rights to use the NFL mark. In contrast, EchoStar did not pay for and has no right to use the NFL trademark to advertise or promote its satellite television service.

73. Despite objection from the NFL, EchoStar engaged in unauthorized use of the NFL trademark over at least a three-year period. The use of the trademark was likely to cause, and did cause, consumer confusion as to the origin and sponsorship of EchoStar's television service by misleading consumers to believe that EchoStar's service had been endorsed or approved by the NFL and/or DIRECTV, Inc.

74. Since 1994, DIRECTV, Inc. has used the mark "NFL Sunday Ticket" to promote its package of over 200 NFL games. DIRECTV, Inc. has spent substantial sums promoting the NFL Sunday Ticket package. DIRECTV, Inc. used the mark "NFL Sunday Ticket" to promote DIRECTV, Inc. in interstate commerce approximately two years before EchoStar made public use of the slogan "Your Ticket to the NFL." The distinctive "NFL Sunday Ticket" mark has gained widespread recognition and is well-known and famous.

75. EchoStar's use of the slogan "Your Ticket to the NFL" was likely to cause, and did cause, consumer confusion with respect to DIRECTV, Inc.'s "NFL Sunday Ticket" package of NFL games. Consumers were likely to be misled, confused or deceived into the belief that EchoStar's NFL offerings were the same as DIRECTV, Inc.'s and were affiliated with or approved by DIRECTV, Inc. and/or the NFL.

76. EchoStar's advertisements were also false, misleading and deceptive with respect to the description of the number of NFL games available on DISH Network. In large print, EchoStar advertised that up to 147 games are available. Yet, these advertisements failed to disclose that only a small portion of EchoStar's potential or current subscribers could receive all

of the claimed 147 games – those who qualified and paid for two distant network signal packages. Subscribers who did not qualify or wish to pay for the distant network signal packages were unable to receive a significant number of the claimed 147 games.

77. The foregoing practices were also unlawful, unfair and fraudulent acts of unfair competition.

78. As a result of EchoStar's false, misleading and deceptive advertising, unauthorized use of the NFL and NFL Sunday Ticket marks, and acts of unfair competition, consumers were likely to be and have been misled, deceived and confused. As a result of the deceptive advertisements, DIRECTV, Inc. has been damaged by loss of subscribers, revenue and goodwill.

V. CAUSES OF ACTION

COUNT I

Tortious Interference with Contract (Brought by DIRECTV, Inc.)

79. DIRECTV incorporates the allegations of Counterclaim paragraphs 1 through 78 as if fully set forth in this Count I.

80. DIRECTV, Inc. and Kelly Broadcasting System entered into an Agreement effective October 14, 1999.

81. Upon information and belief, EchoStar learned of the existence and general terms of the October 14 Agreement.

82. Upon information and belief, EchoStar intentionally, improperly and maliciously caused KBS to repudiate and breach the October 14 Agreement. EchoStar used wrongful means to accomplish its goal of disrupting the business relationship between KBS and DIRECTV, Inc.

83. As a direct and proximate result of EchoStar's actions, DIRECTV, Inc. has

suffered damages and has been irreparably harmed. DIRECTV, Inc. is entitled to compensatory and punitive damages from EchoStar, in amounts to be demanded and proven at trial.

COUNT II

Unfair Competition in Violation of Section Forty-Three of the Lanham Act and Demand for Accounting of Illegal Profits (Brought by DIRECTV, Inc.)

84. DIRECTV incorporates the allegations of Counterclaim paragraphs 1 through 78 as if fully set forth in this Count II.

85. EchoStar has made, in commerce, material false and misleading representations of fact in connection with the commercial advertising or promotion of its product, which have been and are likely to cause confusion or mistake as to the characteristics, origin and approval of its products and services.

86. These misrepresentations include, but are not limited to, all of those representations described above, including:

- a. that EchoStar had a legal right to transmit local programming to subscribers in served households under the SHVA;
- b. that EchoStar had a legal right to transmit distant network programming to subscribers in served households under the SHVA;
- c. that EchoStar was using an adequate and lawful method to determine eligibility to receive network programming under the SHVA;
- d. that the "Primestar Promotion" and other practices related to converting Primestar subscribers to EchoStar were affiliated with, approved by, or originated with Hughes or its subsidiary Primestar;
- e. that the NFL approved or sponsored EchoStar's DISH network;

f. that "Your Ticket to the NFL" indicated approval or affiliation of DISH Network by the NFL and/or DIRECTV, Inc., or that EchoStar's service originated with DIRECTV, Inc. and/or the NFL; and

g. that up to 147 NFL games were available on DISH Network to all subscribers.

87. DIRECTV, Inc. has suffered damage (including irreparable injury) to its business and/or property as a direct and proximate result of EchoStar's unfair competition in violation of Section 43 of the Lanham Act, 15 U.S.C. § 1125(a), in amounts to be demanded and proven at trial.

COUNT III

Deceptive Trade Practices in Violation of the Colorado Consumer Protection Act (Brought by DIRECTV, Inc.)

88. DIRECTV incorporates the allegations of Counterclaim paragraphs 1 through 78 as if fully set forth in this Count III.

89. The acts and practices described herein constitute violations of the Colorado Consumer Protection Act, including but not limited to, Colo. Rev. Stat. § 6-1-105(1)(a, b, c, e, i, u, z).

90. All of the above unfair and deceptive practices occurred in the course of EchoStar's business, and they have all significantly impacted the public as actual or potential customers of EchoStar's services.

91. EchoStar's conduct as alleged above has been in bad faith, within the meaning of the Consumer Protection Act.

92. DIRECTV, Inc. has suffered damage (including irreparable injury) in the course of its business, in part in Colorado, as a direct and proximate result of EchoStar's deceptive

trade practices in violation of Colo. Rev. Stat. § 6-1-105, in amounts to be demanded and proven at trial.

COUNT IV

Common Law Unfair Competition (Brought by DIRECTV, Inc.)

93. DIRECTV incorporates the allegations of Counterclaim paragraphs 1 through 78 as if fully set forth in this Count IV.

94. As described above, EchoStar advertised the availability of local and distant network programming and sold such programming to its subscribers in violation of federal law.

95. As described above, EchoStar has misused and infringed the PRIMESTAR® mark and engaged in an unfair, deceptive and illegal course of conduct intended to convert PrimeStar customers to EchoStar's DISH Network.

96. As described above, EchoStar has misused the trademark NFL and has created consumer confusion through its use of the slogan "Your Ticket to the NFL."

97. EchoStar's actions are illegal and unfair and were intended to obtain an unfair competitive advantage and to adversely affect DIRECTV, Inc.'s ability to compete.

98. Because of these unfair and illegal practices, certain prospective DIRECTV, Inc. customers have chosen to purchase EchoStar's services instead, and certain existing DIRECTV, Inc. customers have switched to DISH Network.

99. As a direct and proximate result of EchoStar's unfair and illegal practices, DIRECTV, Inc. has suffered damage (including irreparable injury) in its trade and business in markets throughout the United States, in amounts to be demanded and proven at trial.

COUNT V

**Violation of California Business and Professions Code § 17200
(Brought by DIRECTV, Inc.)**

100. DIRECTV incorporates the allegations of Counterclaim paragraphs 1 through 78 as if fully set forth in this Count V.

101. DIRECTV, Inc. is a direct competitor of EchoStar and DISH Network in California and elsewhere.

102. EchoStar has committed and/or conspired to commit unfair, unlawful and fraudulent business acts and business practices and unfair, deceptive, untrue or misleading advertising in California and throughout the United States that offend established policy and are unethical, oppressive, unscrupulous, and/or substantially injurious to customers.

103. DIRECTV has suffered injuries from such acts and practices in violation of Sections 17200 et seq. of the California Business and Professions Code.

104. DIRECTV, Inc. is entitled to restitution, disgorgement and injunctive relief.

COUNT VI

**Violation of California Business and Profession Code § 17500
(Brought by DIRECTV, Inc.)**

105. DIRECTV incorporates the allegations of Counterclaim paragraphs 1 through 78 as if fully set forth in this Count VI.

106. As described above, EchoStar intentionally made deceptive, false and misleading statements in advertising its services. These statements were likely to and actually did deceive members of the public. EchoStar knew, or with the exercise of reasonable care should have known, that its statements were deceptive, false and misleading.

107. The deceptive, false and misleading advertising alleged above constitutes a violation

of Cal. Bus. & Prof. Code § 17500.

108. DIRECTV, Inc. is entitled to restitution, disgorgement and injunctive relief.

COUNT VII

Federal Trademark Infringement under Section 32 of the Lanham Act (Brought by Hughes)

109. Hughes incorporates the allegations of Counterclaim paragraphs 1 through 78 as if fully set forth in this Count VII.

110. Hughes is the owner of a federally registered service mark for PRIMESTAR, U.S. Registration No. 1,663,679, registered in 1991. That registration is incontestable under the provisions of the Lanham Act. Primestar, Inc. is licensed under the PRIMESTAR registered mark. EchoStar's unauthorized uses of the PRIMESTAR® mark were likely to cause confusion, or to cause mistake, or to deceive customers into believing that the services and goods offered by EchoStar and its DISH Network originated with, were endorsed or sponsored by, or were otherwise affiliated with DIRECTV, Inc. and Hughes, when that was not and is not true. EchoStar's infringing acts in conjunction with its "Primestar Promotion" have caused actual confusion and have misled and/or deceived Primestar customers into switching from Primestar to DISH Network programming and hardware in the mistaken belief that they were simply upgrading their Primestar service. EchoStar's unauthorized uses of the PRIMESTAR® mark constitute intentional and willful infringement of Hughes's rights in and to the federally registered PRIMESTAR® mark in violation of 15 U.S.C. § 1114 (Section 32(1) of the Lanham Act).

111. As a result of EchoStar's infringing acts, Hughes has suffered substantial injury, including irreparable injury. Hughes is entitled to damages for EchoStar's infringement, in amounts to be demanded and proven at trial, treble damages and an accounting of EchoStar's

profits.

112. This case is exceptional, and, therefore, Hughes is entitled to an award of its attorneys' fees pursuant to 15 U.S.C. § 1117.

DEMAND FOR JURY TRIAL


113. DIRECTV and Hughes request their counterclaims be tried before a jury to the extent permitted by law.

PRAYER FOR RELIEF

WHEREFORE, DIRECTV, Inc. and Hughes pray that this Court:

1. Enter judgment in favor of DIRECTV, Inc. and/or Hughes on each counterclaim;
2. Award DIRECTV and Hughes the damages they have suffered, subject to the enhancement provisions of the foregoing statutes;
3. Award costs and attorneys' fees and an accounting of EchoStar's profits to the full extent provided for by the Lanham Act;
4. Award prejudgment interest, as allowed by law;
5. Award such other and further relief as this Court deems just and appropriate;
6. Issue a permanent injunction under Fed. R. Civ. P. 65 prohibiting EchoStar from committing the foregoing acts of unfair competition and false advertising; and
7. Require EchoStar to send a copy of any decision in this case in favor of DIRECTV and/or Hughes to each retail dealer to whom EchoStar distributed infringing advertising materials informing such retail dealers of the judgment and that the use of the infringing advertising and/or false and misleading materials in connection with the distribution, sale, offering for sale, advertisement or promotion of any product or service by EchoStar is prohibited.

Respectfully submitted this 7th day of June, 2001.


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CERTIFICATE OF SERVICE

This is to certify that on June 7, 2001, a true and correct copy of "ANSWER TO AMENDED COMPLAINT, AFFIRMATIVE AND OTHER DEFENSES, AND COUNTERCLAIM" was served via Facsimile and United States Mail, first class postage prepaid, addressed as follows.

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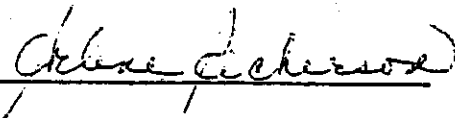
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ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

U.S. DISTRICT COURT
DISTRICT OF COLORADO

2008 OCT -5 PM 01:19

JAMES H. HANNEBAKER
CLERK

Civil Action No. 00-K-212

BY _____ DEP. CLK

ECHOSTAR COMMUNICATIONS CORPORATION,
a Nevada corporation; ECHOSTAR SATELLITE
CORPORATION, a Colorado corporation; and ECHOSTAR
TECHNOLOGIES CORPORATION, a Texas corporation,

Plaintiffs,

v.

DIRECTV ENTERPRISES, Inc., a Delaware corporation;
DIRECTV, Inc., a California corporation;
DIRECTV MERCHANDISING, Inc., a Delaware corporation;
DIRECTV OPERATIONS, Inc., a California corporation;
HUGHES NETWORK SYSTEMS, a Delaware corporation; and
THOMSON CONSUMER ELECTRONICS, Inc.,
d/b/a RCA, a Delaware corporation,

Defendants.

AND RELATED COUNTERCLAIMS

**DIRECTV DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON
ECHOSTAR'S ANTITRUST CLAIMS
(COUNTS 1, 2, 3, 4, 5, 6, 7 and 10, 11, 12 AND 13)**

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I. Introduction

EchoStar's antitrust claims, which attack a variety of DIRECTV's marketing and business practices, are viable only if DIRECTV has market or monopoly power. EchoStar alleges that DIRECTV has such power: "each of these anti-competitive arrangements [is] based on an abuse of [DIRECTV's] market power, [and] each such arrangement further solidifies [DIRECTV's] monopoly." Complaint, ¶ 102.

On literally hundreds of occasions, however, EchoStar has admitted, urged and sworn the exact opposite: that satellite television providers like DIRECTV (and itself) do not have market power because they compete with more dominant cable television providers. A typical example occurred on the very day this suit was filed. While EchoStar was telling this Court that DIRECTV has market power, it was telling the FCC that "broadcast stations do not need to be protected from the market power of satellite carriers for the simple reason that satellite carriers do not have market power." *EchoStar Comments*, February 1, 2000, at 2 (Ex. A at 3).¹ Here are just two more examples:

- "As a multichannel video programming distributor, EchoStar competes directly for subscribers with cable operators." *Schwimmer Declaration*, November 24, 1997, at ¶ 3 (Ex. B at 42).
- "EchoStar competes in the same market as cable operators. . . . EchoStar prices its service to beat comparable cable packages and tries to make its offerings as close a substitute for a cable subscription as possible." *EchoStar Comments*, April 6, 1998, at 6 (Ex. C at 72).

¹ The text of this motion contains short-form citations to administrative, legislative, and Internet materials. Full citations to each are included in the separately-filed Appendix of Full Factual Authorities ("Full Appendix") to which the materials are attached. For the Court's convenience, DIRECTV has prepared a separate document, entitled "Excerpts of Factual Authorities," which contains just the relevant pages from the sources attached to the Full Appendix.

Because of these admissions and dozens more like them (set forth in the Appendix of Additional Evidence), EchoStar cannot argue in good faith that cable television does not compete with satellite television. The two consist of the same programming; they are marketed as alternatives; and most subscribers who now get their television via satellite used to watch cable. Both satellite and cable share the same market -- the pay television, or MVPD, market.² DIRECTV's share of this market is less than eight percent, which is insufficient as a matter of law in this Circuit to establish market power.

EchoStar seeks to sidestep this problem by characterizing the relevant market as a "high-powered direct-broadcast satellite market." That is a made-for litigation definition that conveniently excludes cable providers and thus ignores economic reality. In contrast, DIRECTV³ will establish that: (i) EchoStar's antitrust claims require a showing of monopoly or market power in the relevant market; (ii) DIRECTV has neither monopoly nor market power in any reasonably plausible relevant market, *i.e.*, one that includes cable television providers; and (iii) DIRECTV is therefore entitled to summary judgment on EchoStar's antitrust claims.⁴

² "MVPD" stands for multi-channel video programming distribution, and is an acronym widely used in the industry and by federal regulators to refer to all providers of multi-channel video, including cable, satellite, and various other technologies.

³We collectively refer to the four DIRECTV defendants as "DIRECTV." Defendant Hughes Network Systems, which itself is not a separate entity, is a division of Hughes Electronics Corporation that manufactures consumer electronics products. So does defendant Thomson Consumer Electronics.

⁴ DIRECTV believes that every one of the numerous claims in EchoStar's complaint is deficient as a matter of law and susceptible to summary judgment. In addition, there are additional grounds on which certain of the claims challenged in this motion are susceptible to summary judgment. However, for purposes of efficiency and clarity, DIRECTV directs this particular motion only at EchoStar's antitrust claims on the basis of the common defect uniting all of these claims.

II. Statement Of Undisputed Material Facts

A. Background re Multi-Channel Video Programming Distribution

1. Before the 1980s, the only available television programming in most areas consisted of over-the-air transmissions by local broadcasters. This was often limited to network programming from NBC, CBS and ABC, as well as perhaps a few more channels. *See generally* FCC Office of Plans and Policy Working Paper, June 27, 1991, at 1, 11 (Ex. E at 124, 134).

2. Cable television arose as an alternative to broadcasting when, in the late 1970s and 1980s, advances in satellite technology allowed local cable systems to obtain new programming such as HBO, CNN, ESPN and Showtime. *See FCC Report and Order*, July 15, 1988, at ¶ 27 (Ex. F at 229). The cable companies packaged this new programming with local broadcast signals to create a new service: multi-channel video programming distribution ("MVPD"). It proved enormously popular, leading to a proliferation of cable programming, which, in turn, increased cable's popularity even more.

3. DIRECTV began to offer Direct Broadcast Satellite ("DBS") service, *i.e.*, subscription television delivered directly to consumers through a pizza-sized satellite dish, in 1994. EchoStar launched its DBS service in 1996, having been formed earlier by Charles W. Ergen, whose "vision" was "true effective competition to cable." *Ergen Testimony*, January 27, 1999, at 1 (Ex. G at 313); *Ergen Testimony*, July 28, 1998, at 1 (Ex. H at 322); *Ergen Testimony*, April 1, 1998, at 1 (Ex. I at 335); *Ergen Testimony*, February 4, 1998, at 1 (Ex. J at 349); *Ergen Testimony*, October 30, 1997, at 3 (Ex. K at 362).

4. Today EchoStar and DIRECTV are the two principal providers of satellite-based multi-channel video programming through their DBS services. Complaint, ¶¶ 21-22.

5. EchoStar, following terminology adopted by the Federal Communications Commission, calls itself "a multichannel video programming distributor ('MVPD') providing

Direct Broadcast Satellite[] service to subscribers throughout the United States." *EchoStar Comments*, August 6, 1999, at 1 (Ex. L at 370).

6. The fundamental characteristic of MVPD service is an offering of multiple video channels for a monthly subscription fee. This service, the essence of every cable offering, can be and is offered by several technologies besides cable. DBS is the most successful to date; EchoStar itself calls DBS "the closest competitor to cable television for the provision of multichannel video program distribution services." *EchoStar Comments*, March 2, 1999, at i (Ex. M at 387).

7. Other MVPD technologies include C-Band satellite service, Multichannel Multipoint Distribution Service⁵, Satellite Master Antenna Television Systems⁶, and a collection of technologies available to telephone companies wishing to offer MVPD service.⁷

B. DBS Service and Cable Service Are Substitutes

8. A consumer subscribing either to EchoStar (which markets under the name "DISH Network") or to DIRECTV gets fundamentally the same thing that cable sells: multiple channels of video programming. These typically consist of broadcast network programming; the "basic cable" programming like ESPN, CNN, and TBS; "premium" offerings like HBO, Showtime, and Pay-Per-View movies; and specialty channels like Home and Garden TV and computer-oriented ZDTV. *See, e.g., DISH Network Programming Overview* (Ex. O) and *Basic Channel Package List* (Ex. P).

⁵ MMDS systems transmit video programming to subscribers using microwave frequencies. The MMDS industry provides competition to cable operators, with approximately 820,000 MVPD subscribers nationwide. *Sixth Annual Report* at ¶ 87 (Ex. N at 470).

⁶ SMATV systems focus principally on serving subscribers in multiple dwelling units. As of June 1999, there were approximately 1.5 million SMATV subscribers in the United States. *Sixth Annual Report* at ¶ 95 (Ex. N at 474-75).

⁷ Telephone companies are viewed as formidable potential entrants into the MVPD market, though they do not yet represent a significant national MVPD presence. *Sixth Annual Report* at ¶ 121 (Ex. N at 488).

9. EchoStar's channel array allows it to claim that DISH Network is "[a] better value than cable," *DISH Network Advertisement*, March 16, 2000 (Ex. Q), because it "offers programming packages that have a better 'price-to-value' relationship than packages currently offered by most other subscription television providers, particularly cable TV operators." *EchoStar 10-K for year ending December 31, 1999*, at 6 (Ex. R at 607).

10. EchoStar tells consumers that DBS service is a direct substitute for cable service. For example, EchoStar's advertising says "The Best Television Has To Offer Doesn't Come From Cable, It Comes From Above. *** The Best Television Comes on a DISH." *EchoStar Advertisement* [ECC 0006563] (Ex. S)⁸.

11. Cable companies similarly tout their service as being a superior competitive alternative to DBS. For example, AT&T says: "AT&T Digital Cable gives you the entertainment you crave -- with greater variety, control, and programming choices -- right through the cable in your home. No special digital TV, no satellite equipment to buy and install." *AT&T Advertisement*. (Ex. T)⁹

12. Most DBS customers switched from cable. EchoStar's CEO has testified that "most of [EchoStar's customers] chose the DISH Network over their existing cable provider." *Ergen Testimony*, October 30, 1997, at 3 (Ex. K at 362). EchoStar has estimated that "about 60% of its subscribers have switched to EchoStar from cable systems." *EchoStar Comments*, July 23, 1997, at 3 (Ex. U at 741).

⁸ See Appendix of Additional Factual Authorities, Tabs 1-4 ("Additional Appendix"), for more advertisements promoting EchoStar as a direct substitute for cable service.

⁹ See Additional Appendix, Tabs 5-6, for more advertisements comparing cable to DBS.

13. EchoStar "has viewed cable subscribers as its primary target market," and "has priced and structured its offering with the primary purpose of attracting cable subscribers." *Id.* at 2 (Ex. U at 740).¹⁰

C. Every Federal Agency Considering The Issue Has Always Found That Cable and DBS Compete in the Same Market

14. Federal legislation directs the FCC to report annually "on the status of competition in the market for delivery of video programming." 47 U.S.C. § 548(g). The FCC first did so in 1994, finding that the relevant product market should be defined as the MVPD market. *First Report* at ¶ 49 (Ex. W at 797).

15. The FCC found that the MVPD market includes cable companies and DBS providers, as well as other types of providers. *Id.*

16. The FCC has repeated this analysis five times since. Each time, it found that cable and DBS compete in the same relevant market.¹¹

¹⁰ The Department of Justice has cited the cable companies' increased marketing against DBS as potent evidence supporting the existence of an MVPD market. *See, e.g., DOJ Comments*, January 14, 1999, at 4 (Ex. V at 771) (finding that "cable television companies have developed business plans that specifically counter the perceived competitive threat from DBS . . . [,] spend considerable time and money monitoring advances made by DBS and have devised 'anti-DBS' marketing strategies [including establishing a] '1-888-DISH-HEL[P]' hotline through which consumers interested in DBS are discouraged from purchasing it and steered back to cable").

¹¹ *See Sixth Annual Report* at ¶¶ 5, 8, 70 (Ex. N at 427-28, 461) (cable television "still is the dominant technology for delivery of video programming to consumers in the MVPD marketplace," "[m]uch of the increase in the growth of noncable MVPD subscribers is attributable to the growth of DBS," "DBS remains cable's largest competitor"); *Fifth Annual Report* at ¶¶ 6-7 (Ex. X at 954) (cable television "continues to be the primary delivery technology for the distribution of multichannel video programming and continues to occupy a dominant position in the MVPD marketplace," but there has been an "increase in the total number of subscribers to noncable MVPDs" that is "attributable to the continued growth of DBS"); *Fourth Annual Report* at p. 9 (Ex. Y at 1174 ("DBS service is available in almost all areas and constitutes the most significant alternative to cable television"); *Third Annual Report* at ¶ 4 (Ex. Z at 1403-05); *Second Annual Report* at ¶ 5 (Ex. AA at 1562-63).

17. The FCC has found *more than seventy times* that MVPD is the relevant market in which DBS service competes.¹²

18. The Department of Justice, the staff of the Federal Trade Commission, the United States General Accounting Office (GAO), and Congress have all considered whether cable and DBS compete in the same market, and all agree they do compete in one MVPD market. *See, e.g., DOJ Comments*, January 14, 1999, at 3 (Ex. V at 770) (relevant market is MVPD market); *DOJ Complaint*, May 12, 1998, at ¶ 62 (Ex. BB at 1737) (relevant product market is "the delivery of multiple channels of video programming directly to the home" via "a number of distinct methods, including cable, satellite or wireless technologies"); *Federal Trade Commission Reply Comments*, March 1998, at 3 (Ex. CC at 1750); *General Accounting Office Report*, July 1999, at 9 (Ex. DD at 1766); *Joint Explanatory Statement*, 145 Cong. Rec. H11792 (Ex. EE at 1801) ("Satellite . . . offers an attractive alternative to other providers of multichannel video programming; in particular, cable television"); *1992 Cable Act*, 47 U.S.C. § 522(13) ("multichannel video programming distributor" means a person such as, but not limited to, a cable operator [or] a direct broadcast satellite service . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming").

19. After DBS became commercially available, *no* governmental authority has ever recognized the existence of a separate relevant DBS market for evaluating competitive effects resulting from the activities of DBS providers.

D. EchoStar has Repeatedly Told the FCC and Others That DBS Competes with Cable

20. During its frequent participation in many FCC proceedings, EchoStar has declared at least twenty different times that cable and DBS providers compete with each other. These

¹² Authorities establishing this proposition are included in the Full Appendix, Exhibits N, W-AA, JJ, MM and OO, and Additional Appendix, Tabs 7-68.

proceedings include rulemaking proceedings,¹³ merger reviews and related transfers of DBS authorizations,¹⁴ as well as program access complaints filed by EchoStar to obtain damages against its cable competitors and their programmer affiliates.¹⁵ In addition to the statements cited in this motion, the attached Additional Appendix, Tabs 69-94, contain highlights -- by no means exhaustive -- of even more of these admissions by EchoStar.

21. In February 1999, EchoStar admitted that "cable television . . . is the major competitor to the satellite industry" in a pleading filed in the Southern District of New York and signed by the very counsel who represents EchoStar in this case. *See PrimeTime 24 Joint Venture Complaint*, September 23, 1998, at ¶ 11 (Ex. KK at 1952) and *EchoStar Answer*, Feb. 22, 1999, at ¶ 11 (Ex. LL at 2099).

22. In December 1998, EchoStar and MCI asked the FCC to permit EchoStar to acquire additional spectrum rights from MCI. *See FCC Order and Authorization*, May 19, 1999 (Ex. MM). In seeking the FCC's approval, EchoStar emphasized that "the MVPD market -- not any subset of that market -- is the relevant market for analyzing . . . the proposed transaction." *EchoStar-MCI Application*, December 2, 1998, at 7 (Ex. NN at 2206). EchoStar further argued that the transaction was in the public interest because it would "promot[e] competition in the MVPD market and thereby mitigat[e] the dominance of cable operators." *Id.*

¹³ See, e.g., *EchoStar Comments*, April 6, 1998, at i (Ex. C at 62) (commenting that "[r]educing the regulatory burdens that DBS providers face will increase the likelihood of effective competition in the multichannel video programming distribution ('MVPD') market").

¹⁴ See, e.g., *EchoStar's Petition to Dismiss or Deny*, August 22, 1997, at ii (Ex. FF at 1830) (arguing that the challenged transaction was "carefully designed to thwart any likelihood that an entity unaffiliated with cable operators . . . might influence the use of the DBS spectrum to compete against other cable operators"); *EchoStar's Petition to Dismiss or Deny*, September 25, 1997, at iv (Ex. GG at 1864) (commenting that "[t]he sale of the MCI permit and DBS satellites to PRIMESTAR appears itself to be the product of the cable operators' market power and anti-competitive conduct").

¹⁵ See, e.g., *FCC Order on Reconsideration*, June 30, 1999 (Ex. HH); *FCC Memorandum Opinion and Order*, January 26, 1999 (Ex. II); *FCC Memorandum Opinion and Order*, June 14, 1999 (Ex. JJ).

23. In this context, EchoStar argued specifically that DBS and cable companies compete in the same relevant product market:

EchoStar's existing DBS service corroborates that DBS operators can and do compete in the same market as cable operators -- albeit from a handicapped position. EchoStar prices its service to beat comparable cable packages and tries to make its offerings as close a substitute for a cable subscription as possible.

EchoStar-MCI Application at 8-9 (Ex. NN at 2207-2208).

24. EchoStar also argued that whatever differentiation may have existed between cable and DBS in the past, the two services were now directly competitive:

EchoStar has launched its DBS service and embarked on an aggressive strategy of competing against cable on price, and has thus departed from the DBS model prevailing in 1995. This change has obviated any need for the [FCC] to "push" DBS operators in the direction of positioning themselves as substitutes for cable — EchoStar has positioned itself voluntarily. . .

* * *

. . . it is now possible for DBS to compete head-to-head with cable by providing all of the services seamlessly offered by the cable industry.

EchoStar-MCI Application at 21 (Ex. NN at 2220).

25. In granting EchoStar's application, the FCC relied on EchoStar's statements and found that:

[c]able operators and DBS operators compete in the same markets and at present, cable operators rather than DBS operators tend to dominate those markets. Thus if our grant of EchoStar's request allows it to offer a closer substitute to cable operator's offerings, then, by implication, some cable operators may suffer adverse economic impacts because of the increased competition. The public interest, however, is in insuring robust competition and not in protecting the financial interests of particular firms. In this particular instance, consumers will benefit from the increased competition.

FCC Order and Authorization, May 19, 1999 at ¶ 35 (Ex. MM at 2178).

26. In another proceeding before the FCC in 1998, EchoStar again argued, and the FCC found, that EchoStar "competes against cable operators in every cable franchise area and is

therefore a 'multichannel video programming distributor,'" within the meaning of the 1992 Cable Act. *FCC Memorandum Opinion & Order*, April 17, 1998, at ¶¶ 6, 21 (Ex. OO at 2319, 2323).

27. In fact, EchoStar has expressly disavowed the existence of any "DBS market" which its antitrust allegations in this case now require: "While the phrase 'DBS business' hints at an attempted gerrymandering of the relevant product market, PRIMESTAR has not denied, and cannot deny, that the MVPD market is the relevant market for analysis." *EchoStar Reply*, October 20, 1997, at 8 n.10 (Ex. PP at 2345).

E. Cable Dominates The MVPD Market

28. EchoStar has asserted on innumerable occasions that cable dominates the MVPD market. For example, "[i]ncumbent cable operators clearly continue to dominate the MVPD market." *EchoStar Comments*, September 8, 2000, at 3 (Ex. QQ at 2361).¹⁶

29. According to EchoStar, all satellite television providers combined have just 9.8% of the MVPD market. *EchoStar-MCI Application*, December 2, 1998, at 9-10 (Ex. NN at 2208-09).

30. EchoStar claims that DIRECTV has between 66% and 72% of DBS subscribers. *See Complaint* at ¶ 27.

31. EchoStar thus concedes that DIRECTV's share of the MVPD market is no more than 7.1 per cent.

III. Argument

EchoStar pleads claims under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, as well as Colorado state analogs. At bottom, each of EchoStar's antitrust claims alleges that DIRECTV injured EchoStar by requiring third-party suppliers or distributors to deal exclusively with DIRECTV, or not at all. EchoStar challenges several different forms of

¹⁶ See Additional Appendix, Tabs 94-97, for additional admissions by EchoStar that cable dominates the MVPD market.

these so-called "exclusive deals": deals with distribution outlets (like retailers), deals with programming suppliers (like sports leagues) and deals with manufacturers of High-Definition television ("HDTV") sets.¹⁷ Each of these deals, says EchoStar, either creates a monopoly or otherwise restrains trade. However, because exclusive dealing arrangements often have procompetitive effects, proof of a defendant's monopoly or undue market power is an essential element to all such antitrust claims in the Tenth Circuit (and elsewhere). EchoStar can prove neither. Therefore, its antitrust claims must fail.

A. To Prevail on Any of Its Antitrust Claims, EchoStar Must Prove that DIRECTV Has Market or Monopoly Power.

Monopolization Claims (counts one, two, three, ten, eleven and twelve) Require Monopoly Power or Market Power. EchoStar's monopolization claims allege that DIRECTV has attempted to eliminate competition in a market EchoStar defines as "high-powered DBS." Complaint ¶¶ 156, 164, 165, 166, 169, 170, 171, 215, 218, 221. To prevail on any of these claims, EchoStar must first properly define a relevant market, and must then prove that DIRECTV has monopoly or market power in that market. A Section 2 monopolization claim requires proof of "the possession of monopoly power in the relevant market." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992). Attempted monopolization requires proof of "a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). To prove this "dangerous probability," EchoStar

¹⁷ Section 1 of the Sherman Act (like Colo. Rev. Stat. § 6-4-104) prohibits any agreement that constitutes an "unreasonable restraint on competition." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Section 2 of the Sherman Act (like Colo. Rev. Stat. § 6-4-105) prohibits actual and attempted monopolization of a market by a single firm. *See Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997) ("Section 2 of the Sherman Act prohibits monopolies, attempts to form monopolies, as well as combinations and conspiracies to do so."). And Section 3 of the Clayton Act prohibits a seller of "goods, wares, merchandise . . . or other commodities" from conditioning the sale of those commodities, or the availability of discounts on the price of those commodities, on the buyer's agreement not to deal with the seller's competitors, if such agreement threatens to substantially lessen competition or create a monopoly. 15 U.S.C. § 14.

must demonstrate that DIRECTV has market power in the relevant market. See *Bright v. Moss Ambulance Serv., Inc.*, 824 F.2d 819, 823 (10th Cir. 1987). Finally, a conspiracy to monopolize claim under Section 2 requires proof of harm to the competitive process. See *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 139 (1998). To prove that harm, EchoStar must show that DIRECTV has market power. See *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994).

To survive summary judgment, EchoStar must therefore make a sufficient showing to establish DIRECTV's monopoly power or market power in the properly defined relevant market. See *Bright*, 824 F.2d at 823-24. Monopoly power requires proof of both power to control prices and power to exclude competition. See *id.* at 824. Market power is "the ability to raise prices above those that would be charged in a competitive market." *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1225 (10th Cir. 1986) (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984)). EchoStar, as shown below, cannot make this showing, and its Section 2 claims must fail.

Exclusive Dealing Claims (counts four, five, six, seven and thirteen) Are Analyzed Under the Rule of Reason.¹⁸ EchoStar also alleges that DIRECTV (or DIRECTV and Thomson together) unreasonably restrained trade by making exclusive deals with retailers and

¹⁸ EchoStar's Count VI alleges both "exclusive dealing" and "tying" claims. The addition of a "tying" allegation does not save EchoStar's claim. First, the claim makes no sense, because the allegedly "tied" product, "DTV-compatible High Power DBS receiving equipment" (Complaint ¶ 190), contradicts EchoStar's other allegations of a "DBS equipment" or "DBS service" market. Also, EchoStar does not compete in any "DTV-compatible" equipment market. Second, to prevail on this claim, EchoStar must prove that DIRECTV has market power in the "tying" product market, in this case, the HDTV set market. *Eastman Kodak Co. v. Image Technical Svcs, Inc.*, 504 U.S. 451, 464 (1992). HDTV technology, as EchoStar admits, is an "emerging technology" (Complaint ¶ 106), and no HDTV manufacturer can have market power in such circumstances. Most important, EchoStar must still show that DIRECTV's and Thomson's conduct creates a substantial threat that they will acquire market power in the tied product market, in this case, the MVPD service market. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 38 (1984) (O'Connor, J., concurring); *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co.*, 758 F.2d 203, 210 (7th Cir. 1985).

distributors of satellite equipment and service that supposedly prevent those retailers from selling EchoStar-compatible equipment and service.¹⁹ Because there are "well-recognized economic benefits to exclusive dealing arrangements"²⁰ (*Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997)), the Rule of Reason governs these arrangements. *Id.* They may be unlawful where they "create or extend [the] market power of a supplier." *Jefferson Parish*, 466 U.S. at 45 (O'Connor, J, concurring); *see also U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595 (1st Cir. 1993) (exclusive arrangement may reinforce market power and raise prices for consumers where outlet foreclosed).

Claims Made Under the "Rule Of Reason" Require Market Power. Market power is an essential element of any "Rule of Reason" claim brought under Section 1 of the Sherman Act (and its Colorado counterpart) or Section 3 of the Clayton Act. *See SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994) ("[r]ule of reason analysis first asks whether the offending competitor ... possesses market power in the relevant market"). As stated above, market power is "the ability to raise prices above those that would be charged in a competitive

¹⁹ None of EchoStar's federal antitrust claims predicates liability on a practice "like price-fixing, . . . entirely void of redeeming competitive rationales" that is eligible for *per se* condemnation under the Sherman Act. *Mitchael v. Intracorp. Inc.*, 179 F.3d 847, 856 (10th Cir. 1999). All of EchoStar's antitrust claims – even the one state law claim (Claim 13) that EchoStar mislabels as a *per se* claim – require EchoStar to prove that DIRECTV has substantial market or monopoly power. Claim 13 alleges a conspiracy between DIRECTV and RCA "in *per se* violation (and otherwise in violation) of Col. Rev. Stat § 6-4-104." Complaint ¶ 224. However, because RCA and DIRECTV are not competitors, their purported "vertical" conspiracy to boycott DISH Network (*see id.* ¶ 225) would not be *per se* illegal under any circumstances. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) ("precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors").

²⁰ For example, Judge Posner observed in *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) that exclusive dealing agreements between manufacturers and distribution outlets can be procompetitive by assuring the distributor devotes all of its resources to promoting the manufacturer's product, thus making that product more competitive with alternatives.

market." *Westman Commission Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1225 (10th Cir. 1986). Here in the Tenth Circuit, proof of monopoly or market power is a "critical first step, or 'screen' or 'filter,' which is often dispositive of the case." *SCFC*, 36 F.3d at 965. In either a Section 1 or Section 2 case, the Tenth Circuit first analyzes whether a firm has that power. *See id.* If and only if market power is found, the Court then "proceed[s] under rule of reason analyses to assess the procompetitive justifications of the alleged anticompetitive conduct." *Id.* This Court need not reach factual issues about DIRECTV's conduct, because DIRECTV lacks market power in the relevant market.

B. DIRECTV Has No Monopoly or Market Power, Because DIRECTV, and All Other DBS Providers, Compete with Cable Television.

On the very day this case was filed, EchoStar admitted that "satellite carriers do not have market power." *EchoStar Comments*, February 1, 2000, at 2 (Ex. A at 3). This devastating statement is just the tip of an iceberg of dispositive admissions that wreck EchoStar's proposed "DBS market" (Complaint ¶ 1) and show that cable companies, not satellite providers, have the real market power in a correctly defined MVPD market.

1. The Relevant Product Market Is the Multi-Channel Video Programming Market, Which Includes Cable.

a. A Properly Defined Market Must Include All Products That Are Reasonably Interchangeable.

The first step in determining whether a firm has market or monopoly power is to define the relevant market. *See SCFC*, 36 F.3d at 966 (citations omitted). In evaluating whether any jury could reasonably accept EchoStar's proposed DBS-only market definition, the ordinary Rule 56 standards apply. Absent a genuine issue regarding any material fact, summary judgment is appropriate. *See Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett*, 477 U.S. 317, 322

(1986), cited in *Aspen Limousine Serv. Inc. v. Colorado Mountain Express, Inc.*, 919 F. Supp. 371, 374 (D. Colo. 1995) (Kane, J.).

Market definition, a fact issue, can be summarily adjudicated, where, as here, a proposed market is overly narrow, implausible, and result-oriented. See, e.g., *Continental Trend Resources, Inc. v. Oxy USA, Inc.*, 44 F.3d 1465 (10th Cir. 1995) (summary judgment granted due to plaintiff's failure to establish market power, based on too narrow a market definition), *rev'd on other grounds*, 479 U.S. 103 (1986).²¹ "[T]he courts are not free to accept whatever market is suggested by the plaintiff" *Gough v. Rossmoor*, 585 F.2d 381, 389 (9th Cir. 1976); *SCFC*, 36 F.3d at 968-69; *Adidas America, Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999) (antitrust plaintiff may not "define a market so as to cover only the practice complained of; this would be circular or at least result-oriented reasoning."). The problem with result-oriented "markets" such as the one EchoStar proposes is that they "create[] the illusion of market power where none may exist." *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495 (4th Cir. 1986).

The bedrock principle of market definition is that a market must include all products (or services) that have "reasonable interchangeability for the purposes for which they are produced." *United States v. E.I du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *Telex*, 510 F.2d at 917 ("the legal standard is whether the product is reasonably interchangeable"). In other words, a relevant market must include all sellers or products of services that have the "potential ability to deprive each other of significant levels of business." *Thurman Indus. Inc., v. Pay 'N Pak Stores*, 875 F.2d 1369, 1374 (9th Cir. 1989). Summary judgment is regularly granted where there is undisputed evidence that products or services omitted from the

²¹ See also *Key Fin. Planning Corp. v. ITT Life Ins. Co.*, 828 F.2d 635, 643 (10th Cir. 1987) (affirming summary judgment on conspiracy to monopolize claim based, among other things, on market definition that excluded interchangeable products); *Horst v. Laidlaw Waste Sys.*, 917 F. Supp. 739, 743-44 (D. Colo. 1996) (granting summary judgment for defendant for failure by plaintiff to define geographic market properly); *Telex Corp. v. IBM*, 510 F.2d 894, 915-919 (10th Cir. 1975) (reversing judgment based on improperly defined product market).

plaintiff's proposed market definition are interchangeable and competitive with products within that definition. *City of Chanute v. Williams Natural Gas Co.*, 743 F. Supp. 1437, 1457 (D. Kan. 1990) (summarily adjudicating product market: "as a matter of law the trial court must not exclude from the relevant product market definition products which vigorously compete with the product defined by [the] trial court.").

b. Cable and Other MVPD Services Are Interchangeable with DBS.

The principle of reasonable interchangeability dooms EchoStar's claims here. Three indisputable facts cement EchoStar's outright admission that "the MVPD market -- not any subset of that market -- is the relevant market." *EchoStar-MCI Application* at 7 (Ex. NN at 2206).

MVPD Operators Sell Substantially the Same Thing: Cable companies, DBS providers and other MVPDs fundamentally sell the same thing: subscription television. Indeed, for the most part, they sell exactly the same programming, be it network programming, the "basic cable" channels, or the "premium" and Pay-Per-View offerings. This kind of "physical" similarity is not required for two products or services to fall within an antitrust market. *See, e.g., du Pont*, 351 U.S. at 393-400. But where it exists, a single market is evident. *See Westman*, 796 F.2d at 1226 (single market indicated where two products "have essentially similar physical characteristics"); IIA P. Areeda, et al., ANTITRUST LAW 258 (1995) (antitrust market "includes (1) identical products [and] (2) products with such negligible physical or brand differences that buyers regard them as the same product").²²

²² EchoStar argues for a High-Power DBS-only market by enumerating various ways in which DBS service is different from cable. Complaint ¶ 125. For example, EchoStar points out that DBS providers offer "more than 200 channels of programming" and "digital video." *Id.* This gets EchoStar nowhere. Physical differences among products do not put them in separate markets where, as here, they are substitutes for one another. *du Pont*, 351 U.S. at 393-400. The Tenth Circuit addressed this in *Telex*, 510 F.2d at 917, stating: "Where there are market alternatives that buyers may readily use for their purpose, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically

(continued...)

MVPD Operators Actively Compete Against Each Other:

Cable Rates Are On The Rise Again...

DUMP CABLE FOR DISH NETWORK!

EchoStar Advertisement (Ex. RR).

This advertisement makes it clear. DBS companies seek cable customers and vice versa. EchoStar says "it has viewed cable subscribers as its primary market ... and [a]ccordingly, ... has priced and structured its offering with the primary purpose of attracting cable subscribers." *EchoStar Comments*, July 23, 1997, at 2 (Ex. U at 740). The fact that EchoStar, a DBS provider, is pricing its service in competition with cable is particularly noteworthy. This shows the cross-elasticity of demand between cable and DBS service -- the hallmark of a single market. *Westman*, 796 F.2d at 1226; *Telex*, 510 F.2d at 917.

Consumers Routinely Switch From Cable to DBS: EchoStar admits that 60% of its customers came from cable. *EchoStar Comments*, July 23, 1997, at 3 (Ex. U at 741). Although no precise mathematical test determines what per cent substitution is required before a market must include a product or seller, such a substantial percentage of substitution shows vigorous competition between DBS and cable. *See, e.g., City of Chanute*, 743 F. Supp. at 1457. By definition, "[t]wo products, A and B, are in the same relevant market if substitutability at the competitive price is very high." IIA P. Areeda, et al., *ANTITRUST LAW* 253 (1995); *see also id.* at 259 (Further noting that "actual shifts between two products in response to -- or even without -- changes in their relative prices indicate a single market");

²² (...continued)

identical products would be part of the market."). Here, cable television and satellite television are both still television, as EchoStar's advertising slogan -- "The Best Television Comes on a DISH" -- confirms. *See Ex. S.*

ABA Antitrust Section, ANTITRUST LAW DEVELOPMENTS (FOURTH) 505 (1997) (The ultimate determinant of whether products belong in the same market is whether customers are willing to substitute one product for another).

In short, the undisputed evidence of active marketing and substitution between cable and DBS proves they are in the same antitrust market.

2. DIRECTV Has No Market Power in the Relevant Product Market And Is Thus Entitled To Summary Judgment.

As noted earlier, EchoStar has admitted that "satellite carriers do not have market power." *EchoStar Comments*, February 1, 2000, at 2 (Ex. A at 3). In its MCI Application, EchoStar admitted that "all DBS/DTH²³ services combined" have just 9.8% of the MVPD market. See *EchoStar-MCI Application* at 9-10 (Ex. NN at 2208-09). Thus, even accepting the Complaint's allegation that DIRECTV has between 66% and 72% of DBS subscribers (Complaint ¶ 27), DIRECTV's market share in the MVPD market would, at most, be 7.1%. This is well below the lowest possible threshold necessary to establish monopoly power. *Colorado Interstate Gas Co. v. Natural Gas Pipeline of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) ("Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, [but] lower courts generally require a minimum market share of between 70% and 80%"); *Valley Liquors, Inc. v. Renfield Importers*, 822 F.2d 656, 666-67 (7th Cir. 1987) ("Without a showing of special market conditions or other compelling evidence of market power, the lowest possible market share legally sufficient to sustain a finding of monopolization is between 17% and 25%"); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51

²³ "DTH" stands for Direct-to-Home, and, in this context, refers to Medium-Power Ku band and large dish or "C-Band" satellite television services. Thus, "DBS/DTH" captures all subscription television satellite providers. Perhaps, nothing better illustrates the completely result-oriented nature of the relevant market definition EchoStar alleges in its Complaint than the fact that it not only disregards competition between cable and DBS but also the reasonable interchangeability between High-Power DBS and these other two kinds of satellite-based subscription television services.

F.3d 1421, 1438 (9th Cir. 1995) ("most cases hold that a market share of 30 percent is presumptively insufficient to establish the power to control price.").

A 7.1% share of the relevant market likewise creates an overwhelming presumption, never rebutted in the reported case law, that DIRECTV does not have market power. *See also Continental Trend*, 44 F.3d at 1465 (affirming summary judgment where defendant controlled less than 10% of the relevant market); *L.A.P.D., Inc. v. General Elec. Corp.*, 132 F.3d 402, 404-05 (7th Cir. 1997); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987) (shares under 25% are insufficient as a matter of law to demonstrate market power). Absent a showing of DIRECTV's market power, EchoStar cannot show that DIRECTV's conduct harms competition and violates the rule of reason. *SCFC*, 36 F.3d at 965; *see also Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 633 F. Supp. 1360, 1478 (D. Kan. 1987) (citations omitted), *aff'd in relevant part*, 899 F.2d 951 (10th Cir. 1990):

[A] plaintiff seeking to challenge an "exclusive dealing arrangement" must demonstrate the defendant possesses market power, as this is a prerequisite to being able to restrain trade unreasonably. Thus, to establish the existence of a genuine issue of material fact as to its "exclusive dealing" claim, [plaintiff] must produce evidence tending to show [defendant] possesses "market power" which the Tenth Circuit has defined as "the power to control" prices or "the power to exclude competition."

EchoStar cannot demonstrate that DIRECTV has such market power. Therefore, DIRECTV is entitled to summary judgment on EchoStar's antitrust claims.

C. EchoStar Should Be Estopped by Its Admissions, and the FCC's Reliance upon Them, from Denying that the Relevant Market Includes All Pay Television Providers.

As shown above, EchoStar's claim that the relevant market is limited to high-powered DBS is wholly incompatible with dozens of statements made previously before administrative

agencies like the FCC.²⁴ The Tenth Circuit applies collateral estoppel²⁵ to facts and issues fully adjudicated by federal administrative agencies. *See Saavedra v. Albuquerque*, 73 F.3d 1525, 1534-35 (10th Cir. 1996) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991)). In this case, EchoStar has "won" in administrative proceedings by repeatedly advancing a position that flatly contradicts the essence of the antitrust claims it advances in this action. Consequently, EchoStar should be collaterally estopped to deny the existence of cable-DBS competition, the existence of the MVPD market, the market power of cable, and the lack of market power among DBS providers, because it has had a full and fair opportunity to litigate (and in fact did litigate successfully) the same issues in prior actions before the administrative agencies like the FCC.

Moreover, the sheer frequency and consistency with which EchoStar has touted the fact of competition in the MVPD market should give rise to a judicial estoppel against EchoStar. The Tenth Circuit has, in the past, refrained from imposing judicial estoppel, due to its concern that the doctrine may stifle inquiry on the merits. *Parkinson v. California Co.*, 233 F.2d 432,

²⁴ *See, e.g., FCC Order and Authorization*, May 19, 1999, at ¶¶ 11, 15 (Ex. MM at 2172, 2173): In this license transfer proceeding, the FCC's Order granting an assignment of MCI's spectrum rights at the 110° W.L. orbital location to EchoStar necessarily determined the following facts in EchoStar's favor: (1) cable and DBS providers compete in the MVPD market; (2) the MVPD market is the proper market for analyzing DBS providers' market power; and (3) that cable providers, not satellite providers, dominate the relevant MVPD market. *See also, e.g., FCC Memorandum Opinion and Order*, April 17, 1998, at ¶ 21 (Ex. OO at 2323), in which EchoStar asserted, and the FCC found in its ultimate decision, that EchoStar "competes with cable operators in every franchise area in the continental United States." The FCC's authority to grant EchoStar's requested relief here necessarily depended on finding that EchoStar competed with Fox/Liberty's cable affiliates. Consequently, EchoStar should be estopped from litigating here the issue of whether or not it competes with cable.

²⁵ The elements of collateral estoppel are: (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *See, e.g., Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10th Cir. 1995).

438 (10th Cir. 1956). But, the persistence with which EchoStar has argued that it competes in the MVPD market should dissipate any such concern here. Indeed, the Tenth Circuit has acknowledged that the doctrine **could** be applied against a party that has prevailed in a prior proceeding as a result of taking an inconsistent position. *See United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986). This is such a case; indeed, as mentioned above, EchoStar's dozens of factual admissions, made in FCC and federal court proceedings, concerning the relentless competition between cable and DBS providers, cable providers' power and the relevance of the MVPD market squarely contradict the very premise underlying its antitrust claims here. Because of its repeated past - - and present - - efforts to win on the basis of utterly incompatible positions, this court should apply the doctrine of judicial estoppel to EchoStar's inconsistent statements regarding the relevant market in this proceeding.

IV. Conclusion

For the foregoing reasons, this Court should enter judgment in favor of DIRECTV and against EchoStar on counts one through seven and ten through thirteen of EchoStar's Complaint.

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